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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re MARIA V. et al., Persons Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

C.H.,

Defendant and Appellant.

D053423

(Super. Ct. No. SJ11809A-B)

APPEAL from orders of the Superior Court of San Diego County, Ronald L.
Johnson, Judge. Affirmed.

C.H. appeals the court's findings that it had subject matter jurisdiction under the emergency provisions of the Uniform Child Custody and Jurisdiction Enforcement Act, Family Code section 3400 et seq. (UCCJEA).¹

¹ Unless otherwise indicated, further statutory references are to the Family Code.

FACTUAL AND PROCEDURAL BACKGROUND

C.H. is the father of Maria V.² and Alejandra H. (children), who are now 11 and five years old respectively. C.H. and the children's mother, M.V., are Mexican nationals.³ At various times the parents lived in San Diego, California or Tijuana, B.C., Mexico. Maria and Alejandra were born in California and are United States citizens. Their brother, the middle child, is a Mexican national.

In late February 2007 the children began staying with their maternal grandmother, a San Diego County resident, during the week. On March 29 the San Diego County Health and Human Services Agency (Agency) received allegations that C.H. sexually abused Maria. At the social worker's suggestion and with the parents' consent, grandmother initiated guardianship proceedings in San Diego County Superior Court. However, after M.V. briefly took the children from grandmother during a visit in Mexico, the Agency detained the children in protective custody on their return to San Diego. On or about May 1 the Agency filed petitions under Welfare and Institutions Code section 300 (dependency petitions) alleging C.H. sexually abused Maria, and Alejandra was at risk of abuse.

On June 11, 2007, the court determined it did not have subject matter jurisdiction under the UCCJEA, dismissed the dependency petitions and ordered the Agency to

² C.H. is Maria's presumed father. The whereabouts of Maria's biological father are unknown.

³ M.V. does not appeal.

release the children to their parents. The Agency and the children appealed. On June 12 the Agency filed a petition for writ of supersedeas in this court. We granted the writ petition, stayed enforcement of the court's order of June 11, ordered the continued detention of the children and authorized the trial court to exercise temporary emergency jurisdiction under section 3424, subdivision (a), pending resolution of the issues raised on appeal. (*In re Maria V. et al.* (Jan. 18, 2008, D051050) [nonpub. opn.] (*Maria V.*))

In *Maria V.*, we concluded the court properly determined it did not have home state or substantial connection jurisdiction, but the court erred when it denied the Agency's request to consider whether the court had emergency jurisdiction. We reversed the court's orders dismissing the dependency petitions and remanded the case with directions to the court to hold an evidentiary hearing to determine whether the court had subject matter jurisdiction under emergency provisions of the UCCJEA.

That hearing was held on May 22, 2008 (May 22 hearing). The court received into evidence the Agency's reports dated May 2 and 23, and June 11, 2007, and May 5, 2008. M.V. and the current social worker testified. The court concluded it had jurisdiction. On appeal, C.H.'s sole claim is that the Agency improperly procured the children's presence in California and therefore the children were not "present" in the state within the meaning of section 3424, subdivision (a). Accordingly, we provide a summary of the facts relevant to that issue.⁴

⁴ The history of the case is detailed in *Maria V.*

As noted, the Agency's investigation regarding the children began on March 29, 2007. In connection with its investigation into allegations that C.H. sexually abused Maria, the Agency submitted a cross report to DIF⁵ on April 9, 2007, and requested a safety check on the children's brother, who lived with his parents in Tijuana. The International Liaison notified DIF and the United States Consulate that the Agency had temporarily detained the children in San Diego with their grandmother and requested DIF's assistance in investigating the sexual abuse allegations against C.H.

On April 26, 2007, M.V. took the children from grandmother during a visit in Tecate, Mexico. Grandmother notified the social worker. When M.V. and the children returned to Tijuana, she filed a complaint against C.H. with Mexican authorities, took Maria to a doctor for a physical examination and arranged for Maria to be interviewed by DIF on May 9. On April 27 the International Liaison involved DIF, the United States Consulate and the Mexican Police. The United States Consulate planned to conduct a welfare check on the children on April 28, and DIF was to interview the children. If abuse was disclosed, the Mexican Police had the authority to remove the children. The International Liaison was advised to be prepared to pick up the children at the border.

When the social worker advised M.V. of these circumstances, M.V. returned the children to grandmother. M.V. told grandmother there was an investigation pending in Mexico, and she would file a complaint if grandmother left Mexico with the children.

⁵ DIF is the commonly used acronym for the Mexican protective services agency Sistema Nacional para el Desarrollo Integral de la Familia.

Grandmother wanted to return to San Diego and sought the social worker's advice. The social worker advised grandmother that the Agency coordinated investigations with Mexican authorities all the time, the children were at risk of abuse in Mexico and they would be protected in San Diego. Grandmother and the children returned to San Diego on April 27. When they arrived, the Agency detained Maria and Alejandra in protective custody.⁶

On May 4, 2007, the social worker notified the Mexican Consulate (Consul) of the children's detention. The International Liaison notified the Ministry of Foreign Affairs and asked whether they wanted jurisdiction. On June 8 the social worker telephoned the Consul to invite him to the June 11 hearing to explain the position of the Mexican government. The consul stated it was a very difficult situation because the children were United States citizens and the parents were Mexican nationals. The Consul would assist the parents with reunification services but without approval from Mexico, the Consul could not speak to jurisdiction.

In November 2007 the Agency assigned the case to social worker Novelo. At that time, M.V. lived with C.H. and their son in Tijuana. M.V. moved out of C.H.'s home in February 2008. As of May 22, 2008, Novelo had not had any contact with Mexican authorities. She coordinated the parents' services with DIF and was in contact with the

⁶ At some point in time the Agency placed the children in grandmother's care. In December 2007 the Agency removed the children again because of the presence in the household of the children's aunt, who was alleged to have had sexual contact with Maria when Maria was five years old.

International Liaison. According to C.H., he cooperated with DIF's investigation and there were no charges against him.

M.V. testified she moved to San Diego to be closer to the children two weeks before the May 22 hearing. She had no contact with C.H. He could not legally enter the United States. When M.V. took the children from grandmother, she went to the Mexican authorities. They told her she could not live with C.H., and she had not lived with him since that time. M.V. described a history of domestic violence with C.H. as the perpetrator.

The court determined it had temporary emergency jurisdiction under section 3424, subdivision (a). M.V.'s circumstances were not sufficiently stable to enable her to properly care for the children or to protect them from C.H., who allegedly sexually abused Maria, and from their aunt, who was also alleged to have had sexual contact with Maria and was living with grandmother in violation of a court order. The court found there was sufficient evidence to declare the emergency and ordered the Agency detain the children in their current placements pending the jurisdiction hearing.

I

A. The Parties' Contentions

C.H.'s sole contention on appeal is the court erred when it assumed emergency jurisdiction because the Agency improperly caused the children to be brought across the international border against their parents' wishes and therefore the children were not present in this state within the meaning of section 3424, subdivision (a). He asserts the requirement "the child is present in this state" (*ibid.*) was not met because the Agency

social worker improperly procured the children's presence in California without legal authority and by means bordering on fraud and duress.

The Agency responds that C.H. did not raise this argument at the May 22 hearing and has forfeited the issue on appeal. The Agency further contends C.H. does not show the social worker acted improperly or the children were brought to the U.S. improperly. Alternatively the Agency argues that even if the children were brought to the U.S. inappropriately, the court properly exercised its authority under emergency provisions of the UCCJEA. The Agency argues that because Mexico is not a signatory to the UCCJEA and there was no foreign custody order or action pending, this court should affirm the finding of temporary emergency jurisdiction and direct the trial court to enter a final determination of custody. (§ 3424, subd. (b); *In re Angel L.* (2008) 159 Cal.App.4th 1127, 1140.) The minors join in the Agency's arguments.

B. Legal Framework and Standard of Review

The UCCJEA is a jurisdictional statute. It is the exclusive method in California to determine the proper forum in child custody proceedings involving other states. (*In re C.T.* (2002) 100 Cal.App.4th 101, 106.) Foreign countries are treated as states for the purpose of determining jurisdiction. (§ 3405, subd. (a); *In re A.C.* (2005) 130 Cal.App.4th 854, 860.)

The purposes of the UCCJEA in the context of dependency proceedings include avoiding jurisdictional competition and conflict, promoting interstate cooperation, litigating custody where child and family have closest connections, avoiding relitigation of another state's custody decisions and promoting exchange of information and other

mutual assistance between courts of other states. (*In re Jaheim B.* (2008) 169 Cal.App.4th 1343, 1348, citing *In re C.T.*, *supra*, 100 Cal.App.4th at p. 106.)

Under emergency provisions of the UCCJEA, a court has temporary jurisdiction if the child is present in the state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to, or threatened with, mistreatment or abuse. (§ 3424, subd. (a); *In re A.C.*, *supra*, 130 Cal.App.4th at p. 864, citing *C.T.*, *supra*, 100 Cal.App.4th at p. 107.)

An "emergency" exists when there is an immediate risk of danger to the child if returned to a parent. (*In re Jaheim B.*, *supra*, 169 Cal.App.4th at pp. 1349-1350, citing *In re Nada R.* (2001) 89 Cal.App.4th 1166, 1174-1175.) Aside from the necessity of protecting a child from immediate harm, presence of the child in the state is the only prerequisite. (*In re Jorge G.* (2008) 164 Cal.App.4th 125; *In re Angel L.*, *supra*, 159 Cal.App.4th 1127; *In re Nada R.*, *supra*, at p. 1174.)

Subject matter jurisdiction either exists or does not exist at the time the action is commenced and cannot be conferred by stipulation, consent, waiver or estoppel. We are not bound by the juvenile court's findings regarding subject matter jurisdiction but rather independently reweigh the jurisdictional facts. (*In re Jaheim B.*, *supra*, 169 Cal.App.4th at p. 1348, citing *In re A.C.*, *supra*, 130 Cal.App.4th at p. 860.)

C. Forfeiture

The Agency acknowledges the question of subject matter jurisdiction cannot be forfeited. However, it characterizes C.H.'s argument as the affirmative defense of "unclean hands" and contends it is a question of fact that is forfeited by the failure to

make the claim at the trial court level.⁷ (*Committee to Save the Beverly Highlands Homes Assn. v. Beverly Highlands Homes Assn.* (2001) 92 Cal.App.4th 1247, 1268.) The Agency asserts, and the record shows, that C.H. did not raise this claim at the May 22 hearing.

C.H. objects to the Agency's characterization of his claim on appeal as "unclean hands" and reiterates his argument the children were not present in the state as required for jurisdiction under section 3424, subdivision (a). C.H. asserts subject matter jurisdiction may be raised at any time and is not subject to forfeiture. (*In re A.C.*, *supra*, 130 Cal.App.4th at p. 860; *In re Jorge G.*, *supra*, 164 Cal.App.4th at p. 131; *In re Angel L.*, *supra*, 159 Cal.App.4th at p. 1136.)

Here, to find forfeiture, we would need to discuss the doctrine of unclean hands, its codification under the UCCJA and UCCJEA and whether it may be applied to the circumstances here.⁸ However, that issue is not fully briefed and is unnecessary to the resolution of C.H.'s claim on appeal. This court has consistently applied a de novo

⁷ The only published California appellate decision addressing the application of the equitable doctrine of unclean hands within the context of child custody proceedings is *In re Marriage of Ben-Yehoshua* (1979) 91 Cal.App.3d 259, 268. The reviewing court noted that the doctrine of unclean hands and the case law from which it was derived was codified in the Uniform Child Custody Jurisdiction Act (UCCJA), and its application was discretionary with the trial court. (*Ibid.*)

⁸ Section 3428 provides that if the court has subject matter jurisdiction because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless one of several conditions apply. (§ 3428, subd. (a).) However, by its express terms, section 3428 does not apply to temporary emergency jurisdiction. (*Ibid.*) Rather, it applies when the court determines that it has

standard of review to questions of subject matter jurisdiction. (*In re A.C.*, *supra*, 130 Cal.App.4th at p. 860; *In re Jaheim B.*, *supra*, 169 Cal.App.4th at p. 1348.) Further, to the extent C.H. has forfeited his argument, we exercise our discretion to review the claim on appeal. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn. 7.)

*D. Section 3424, Subdivision (a), Requires Only Exigent Circumstances
and the Child's Physical Presence in the State*

We are not persuaded by C.H.'s contention the children were not present in the state for purposes of emergency jurisdiction because the Agency acted improperly to secure their presence. California appellate courts have consistently held that emergency jurisdiction requires only exigent circumstances and the child's physical presence in the state. (*In re Jorge G.*, *supra*, 164 Cal.App.4th at p. 132; *In re Angel L.*, *supra*, 159 Cal.App.4th at p. 1138; *In re Nada R.*, *supra*, 89 Cal.App.4th at p. 1174.)

C.H. provides no legal authority to support his contention section 3424 applies only to a child brought into the state legally or properly. We have not found any case in which the reviewing court declined to take emergency jurisdiction because the child was brought into the state against the express wishes of a parent. To the contrary, the Legislature has expressly declared its intent to expand the grounds on which a court may exercise temporary emergency jurisdiction. (§ 3424, subd. (e); *In re Angel L.*, *supra*, 159 Cal.App.4th at p. 1138 ["[w]e infer from this statutory scheme the Legislature's intent to afford all children found in California the protection of California's juvenile court in

subject matter jurisdiction under other provisions of the UCCJEA but declines to exercise its jurisdiction due to the unjustifiable conduct of a person seeking to invoke it. (§ 3428.)

exigent circumstances"]; *In re Jorge G.*, *supra*, 164 Cal.App.4th at p. 132; see also fn. 8, *ante*.) Thus, contrary to C.H.'s argument, public policy serves to protect children in California that may be at immediate risk of mistreatment and abuse, regardless of their means of arrival.

Even if California law distinguished between the child's means of arrival in the state for purposes of temporary emergency jurisdiction, under the facts presented here, we would not be persuaded the Agency acted improperly. When Maria first alleged sexual abuse, the Agency temporarily detained the children with grandmother. The International Liaison notified DIF and the U.S. Consulate of the children's detention and requested DIF's assistance in investigating the allegations against C.H. M.V. returned the children to grandmother after Mexican authorities told her she could not live with C.H. After being advised of the steps the Agency, DIF and Mexican authorities were planning, including a coordinated investigation, grandmother voluntarily returned to her home in San Diego with the children.

This record does not show that the Agency's actions and advice were coercive or fraudulent, or that the children were improperly present in California. We conclude the court properly determined the children were present in the state and it was necessary to protect the children from mistreatment or abuse. The court correctly found it had temporary emergency jurisdiction under section 3424, subdivision (a).

*E. The Trial Court Determines Whether the Emergency
Custody Order Becomes a Final Custody Order*

The Agency complains about the difficulty in strictly applying the UCCJEA in cross-border child custody disputes involving the United States and Mexico. The Agency asserts Mexico does not have an equivalent to the UCCJEA and lacks procedures to communicate with California courts. The Agency requests that we direct the trial court "to proceed under section 3424, subdivision (a), and enter a final determination of custody." The Agency asserts there are no custody proceedings concerning the children that are pending in Mexico.⁹

If a child custody proceeding has not been or is not commenced in the home state of the child, a child custody determination in this state may become "a final determination, if [the custody order] so provides and this state becomes the home state of the child." (§ 3424, subd. (b); *In re Jaheim B.*, *supra*, 169 Cal.App.4th at p. 1350; *In re Angel L.*, *supra*, 159 Cal.App.4th at p. 1138.) However, if a California court is informed of the commencement or determination of a child custody proceeding in a court of the child's home state, it "shall immediately communicate with the other court." (§ 3424, subd. (d).) If a child custody proceeding has been commenced in the child's home state, any order issued by this state must specify in the order a period of time the court

⁹ Mexico is the children's home state. (*Maria V.*, *supra*, at p. 13.)

considers adequate to allow the person seeking an order to obtain an order from the child's home state. (§ 3424, subd. (c).)

We reject the Agency's request to direct the trial court to enter a final determination of custody. Despite difficulties, California courts must comply with the UCCJEA, as enacted and interpreted in this state. (See, e.g., § 3405, subd. (a) ["[a] court of this state shall treat a foreign country as if it were a state of the United States"]; *In re A.C.*, *supra*, 130 Cal.App.4th at p. 860.) The duration of a custody order made under temporary emergency jurisdiction is committed to the sound discretion of the trial court. (§ 3424.) Further, any consideration by this court of the Agency's unsworn assertion that no child custody proceeding has been commenced in the children's home state during the pendency of this appeal violates generally applicable rules of appellate procedure. (See *In re Zeth S.* (2003) 31 Cal.4th 396, 410, 413.)

DISPOSITION

The orders are affirmed.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.